Manoharan Malayalam & Anor v Dato' Seri Hj Mohd Najib bin Tun Abdul Razak & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)-219 OF 2011

ZAINUN ALI (NOW FCJ), RAMLY ALI AND ZAHARAH IBRAHIM JJCA

6 AUGUST 2012

Civil Procedure — Jurisdiction — Jurisdiction of court — Act or decision of Yang di-Pertuan Agong or Minister under Internal Security Act 1960 — Whether jurisdiction of court completely ousted — Internal Security Act 1960 s 8(B)(1)

Civil Procedure — Striking out — Application to strike out action — Action for wrongful detention — Whether plaintiffs' claim was unsustainable — Res judicata — Whether issues raised in appeal had been determined in earlier habeas corpus applications — Whether jurisdiction of court completely ousted — Whether plain and obvious case to be struck out

The first and second plaintiffs and three other Hindraf detainees were detained for a period of two years pursuant to a detention order ('the DO') under s 8(1) of the Internal Security Act 1960 ('the Act'). The plaintiffs were released after being served with a suspension of DO that imposed various conditions and restrictions on the plaintiffs. However, in the same year the plaintiffs were served with a revocation order ('the RO') and again detained. While in detention the plaintiffs filed various applications for a writ of habeas corpus on various grounds but these applications were dismissed by the High Court, which determined that their detention was lawful. The plaintiffs brought a case against the defendants for wrongful detention based on the issuance of the three orders against the plaintiffs, namely the DO, the suspension of the DO and the RO. By way of this action the plaintiffs sought the sum of RM100m each in general and special damages on the actions and/or omissions of the defendants in issuing the three orders under the Act. It was the first plaintiff's case that in view of his detention he was unable to attend the sittings of the Selangor State Legislative Assembly in which he was an elected representative. The second plaintiff contended that he was deprived of medication and medical treatment during his detention. The defendants filed an application to strike out the plaintiffs' action on the grounds that the issue of lawful detention had been decided during the habeas corpus applications and that the plaintiffs' action was thus res judicata and therefore an abuse of court process. Although the plaintiffs claimed that there were triable issues, the High Court judge found

that it was plain and obvious that the plaintiffs' claim was unsustainable. This was the plaintiffs' appeal against that decision.

Held, dismissing the appeal with no order as to costs:

(1) The plaintiffs' argument that there were other orders issued by the Minister for Home Affairs, which were not the subject matter of the habeas corpus applications filed by the plaintiffs, was untenable. It was not open for the plaintiffs to now challenge the validity of those orders because the issues relating to the suspension of the DO and the RO were events that took place after the disposal of the habeas corpus proceedings. In any case, the plaintiffs did not challenge the validity of the said orders when they were in force. Further the suspension of the DO and the RO emanated from the original DO, which was issued pursuant to s 8(1) of the Act (see paras 24–26).

(2) There was no issue of res judicata in the present appeal. However s 8B(1) had completely ousted the jurisdiction of the court in respect of any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the ISA, except in regard to compliance with any procedural requirement in the Act governing such act or decision. Thus, this was a plain and obvious case to be struck out pursuant to O 18 r 19 of the Rules of the High Court 1980 (see paras 27–28).

[Bahasa Malaysia summary

Plaintif pertama dan kedua dan tiga tahanan Hindraf yang lain ditahan untuk tempoh selama dua tahun berikutan perintah tahanan ('PT') di bawah s 8(1) Akta Keselamatan Dalam Negeri 1960 ('Akta'). Plaintif-plaintif dilepaskan selepas diserahkan dengan penggantungan PT yang mengenakan beberapa syarat dan sekatan ke atas plaintif-plaintif. Walau bagaimanapun, pada tahun yang sama plaintif-plaintif diserahkan dengan perintah pembatalan ('PP') dan ditahan sekali lagi. Semasa dalam penahanan plaintif-plaintif memfailkan pelbagai permohonan untuk writ habeas corpus atas pelbagai alasan tetapi permohonan ini ditolak oleh Mahkamah Tinggi, yang mana menentukan bahawa penahanan mereka adalah sah di sisi undang-undang. Plaintif-plaintif menyaman defendan-defendan untuk penahanan salah berdasarkan pengeluaran tiga perintah tersebut terhadap plaintif-plaintif, iaitu PT, penggantungan PT tersebut dan PP. Melalui tindakan ini plaintif-plaintif memohon sejumlah RM100 juta untuk setiap ganti rugi am dan khas atas tindakan dan/atau peninggalan defendan-defendan dalam mengeluarkan ketiga-tiga perintah tersebut di bawah Akta. Adalah kes plaintif pertama bahawa akibat penahanannya dia tidak dapat hadir untuk persidangan Dewan Undangan Negeri Selangor di mana dia adalah wakil yang dilantik. Plaintif kedua berhujah bahawa dia dinafikan dengan ubat dan rawatan perubatan semasa penahanannya. Defendan-defendan memfailkan permohonan untuk

membatalkan tindakan plaintif-plaintif atas alasan bahawa isu penahanan yang sah telah diputuskan semasa permohonan-permohonan habeas corpus dan bahawa tindakan plaintif oleh itu adalah res judicata dan dengan itu penyalahgunaan proses mahkamah. Walaupun plaintif-plaintif mendakwa terdapat isu-isu yang boleh dibicarakan, hakim Mahkamah Tinggi mendapati bahawa ia adalah jelas dan nyata bahawa dakwaan plaintif-plaintif tidak dapat dikekalkan. Ini adalah rayuan plaintif-plaintif terhadap keputusan tersebut.

Diputuskan, menolak rayuan tanpa perintah kepada kos:

(1) Hujahan plaintif-plaintif bahawa terdapat perintah-perintah lain yang dikeluarkan oleh Menteri Dalam Negeri, yang mana bukan perkara permohonan-permohonan habeas corpus yang difailkan oleh plaintif-plaintif, tidak dapat dipertahankan. Ia tidak terbuka kepada plaintif-plaintif untuk sekarang mencabar kesahan perintah-perintah tersebut kerana isu-isu berkaitan penggantungan PT dan PP adalah kejadian yang berlaku selepas pendengaran prosiding habeas corpus tersebut. Walau bagaimanapun, plaintif-plaintif tidak mencabar keesahan perintah-perintah tersebut apabila ia berkuat kuasa. Selanjutnya penggantungan PT dan PP berpunca daripada PT asal, yang mana dikeluarkan berikutan s 8(1) Akta (lihat perenggan 24–26).

(2) Tidak terdapat isu res judicata dalam rayuan ini. Walau bagaimanapun s 8B(1) telah menyingkirkan bidang kuasa mahkamah berkaitan kepada apa-apa tindakan yang dilakukan atau keputusan yang dibuat oleh Yang di-Pertuan Agong atau Menteri dalam melaksanakan kuasa budi bicara mereka mengikut Akta, kecuali berkaitan pematuhan dengan apa-apa keperluan prosedur dalam Akta yang mengawal tindakan atau keputusan tersebut. Oleh itu, ini adalah kes yang jelas dan nyata untuk dibatalkan berikutan A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 27–28).]

Notes

For cases on jurisdiction of court, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5176–5185.

For cases on application to strike out action, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7992–8012.

Cases referred to

Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor [2009] 2 MLJ 660; [2009] 2 CLJ 839, FC (refd)

Manoharan a/l Malayalam & yang lain lwn Menteri Dalam Negeri, Malaysia & Satu Lagi [2009] 4 CLJ 679, FC (refd)

Legislation referred to

Federal Constitution arts 5, 9
Internal Security Act 1960 ss 8, 8(1), (3), 8B, 8B(1), 8C, 10, 11
Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)(a), (b), (c), (d)

M Manoharan (P Uthayakumar with him) (M Manoharan & Co) for the appellant.
Najib Zakaria (Azizan Md Arshad with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Zainun Ali (Now FCJ) (delivering judgment of the court):

[1] The appeal before us relates to issues of whether the unlawful detention of the plaintiffs which had already been decided during their habeas corpus applications amount to an abuse of court process and thus for that reason, ought to be struck out, pursuant to O 18 r 19(1)(a)–(d). In this judgment the parties will be referred to as they appear in the court below.

THE FACTS

[2] The first and second plaintiff together with three others were Hindraf detainees. They were all detained under the Internal Security Act 1960 ('ISA') pursuant to a detention order dated 13 July 2007 under s 8(1) of the ISA.

Their detention at Kamunting Detention Camp was for a period of two years.

[3] On 9 May 2009, the first and second plaintiffs were released after being served with a suspension detention order dated 8 May 2009 pursuant to s 10 of the ISA. The said suspension of detention order was issued without any grounds being provided, but various conditions and restrictions were imposed on the plaintiffs.

[4] However on 24 July 2009, the second plaintiff was served with a revocation order and this was followed by another revocation order dated 30 September 2009 served on the first plaintiff. When the first defendant became the Prime Minister on 3 April 2009, he released two of the five Hindraf detainees, excluding the plaintiffs.

[5] Whilst in detention, the plaintiffs filed various applications for a writ of habeas corpus on various grounds. The plaintiffs filed some of these applications individually whilst some were filed jointly. They were as follows:

(a) Ipoh High Court (Case No 44–20 of 2008);

(b) Kuala Lumpur High Court (Case No 44–90 of 2007);

(c) Kuala Lumpur High Court (Case No 44–20 of 2008); and

(d) Kuala Lumpur High Court (Case No 44–56 of 2009).

[6] The High Court had, in all of these cases, determined that the detention of the plaintiffs was lawful and the applications for a writ of habeas corpus were accordingly dismissed. The decisions of the High Court were affirmed on appeals to the Federal Court. See *Manoharan a/l Malayalam & yang lain lwn Menteri Dalam Negeri, Malaysia & Satu Lagi* [2009] 4 CLJ 679 and *Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 MLJ 660; [2009] 2 CLJ 839.

[7] In the present appeal, the plaintiffs' action against the defendants was for the sum of RM100m each in general damages and special damages for wrongful arrest, detention, restriction and revocation. The plaintiffs claimed that they had been wrongly detained. It is the plaintiffs' case that:

[8] It is the first plaintiff's case that during the detention he was elected as the representative to the Selangor State Legislative Assembly ('ADUN'). He had taken his oath at the place of detention, but in view of his detention he was unable to attend the sittings of the Selangor State Legislative Assembly.

[9] The second plaintiff's complaints relates to deprivation of medication and medical treatment as follows:

(a) he was deprived of his diabetic medication;

(b) he was not brought to the Institut Jantung Negara for treatment of his heart problem; and

(c) he did not receive treatment for his foot injuries.

[10] Both the plaintiffs brought a case for wrongful detention based on the issuance of the said order ie suspension of detention order dated 8 September 2009. Various conditions and restrictions were imposed on the plaintiffs in that order. No grounds or reasons were given for the issuance of the said order.

[11] The plaintiffs also question the validity of the revocation orders.

[12] The defendants filed an application to strike out the plaintiffs' action pursuant to O 18 r 19(1)(a)–(d). The crux of the defendants' application is premised on the ground that the issue of unlawful detention had been decided during the habeas corpus applications and that the plaintiffs' action is therefore an abuse of court process.

It is the defendant's case that:

(a) by filing the said action, the plaintiffs are trying to move the court to re-open and re-hear all the issues which have been settled by the Federal Court, and are thus res judicata;

(b) the action is barred under s 8B(1) of the ISA. Section 8B reads as follows:

> 8B. Judicial review of act or decision of Yang di-Pertuan Agong and Minister.
>
> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> (2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8A.

(c) the issues of the first plaintiff being elected representative and barred from attending the sittings of the Selangor State Legislative Assembly and the issues of the second plaintiff being deprived of his medication and medical treatment were the very issues dealt with in the habeas corpus applications.

THE PLAINTIFFS' CONTENTIONS

[13] The plaintiffs claimed that there are triable issues in the plaintiffs' claim. The plaintiffs are claiming damages on the actions and/or omissions of the defendants in issuing the three orders under the ISA.

(a)

The detention order dated 13 December 2007.

The plaintiffs raised the following issues against contended that the detention order:

(i) the restrictions imposed in the detention order restrict the freedom of movement of the plaintiffs and thus in breach of art 9 of the Constitution;

(ii) the plaintiffs are challenging the detention order on non-procedural grounds. There are merits in the plaintiffs' claim, namely whether the plaintiffs are a threat to national security; and

(iii) the exercise of the discretionary power of the Prime Minister in not considering the release of the plaintiffs is triable.

(b)

The suspension of detention order dated 8 August 2009.

As regards the suspension of detention order, it is the plaintiff's contention that:

(i) s 8B(1) of the ISA does not bar a claim for damages on suspension of detention order with restrictions;

(ii) ss 8B(1) and 8C are applicable only to s 8 of the Act;

(iii) all previous proceedings in court vide the habeas corpus applications were on the detention order of the plaintiffs. The suspension of detention order and the revocation orders were issued after the disposal of the habeas corpus proceedings; and

(iv) the defendants did not produce any grounds for issuing the suspension of the detention order but only the restrictions. The defendants are thus in breach of art 5 of the Federal Constitution.

(c) The revocation orders dated 30 September 2009 and 24 July 2009 issued on the first plaintiff and second plaintiff respectively, contain no grounds by the defendants. The plaintiff thus claimed damages for the unlawful arrest, detention restriction and revocation. All these claims are triable.

DECISION OF THE HIGH COURT

[14] The learned High Court judge found that it was plain and obvious that the plaintiffs' claim was unsustainable on these grounds:

(a) since the issue of wrongful detention had been decided by the High Court and the Federal Court, there cannot be any actionable claim for wrongful detention. Therefore the plaintiffs' claim for wrongful detention becomes unsustainable;

(b) on the issue of suspension of the detention orders:

(i) unlike ss 8 and 11 of the Act, there is no requirement under s 10 of the Act for any procedure to be complied with nor any grounds to be given for the issuance of a suspension order;

(ii) in any event even if grounds were required, then by way of analogy, the grounds would be the same as those set out for the purposes of the detention order dated 13 December 2007, as mandated by s 11 of the Act; and

(iii) the suspension order emanated from the initial detention order and was not a fresh detention order. Moreover, the initial period of detention had not even expired.

ISSUE(S) IN THE APPEAL

[15] The issue in the appeal relate to:

whether the principle of res judicata applies to the plaintiffs' claim and whether all the issues in the claim have been determined and decided by the court in the habeas corpus applications.

[16] The respondent contended that:

(a) the detention orders

(i) the issue of procedural non-compliance had been discussed in the earlier habeas corpus applications and thus had been decided by the court; and

(ii) under s 8B(1) of the ISA, any action by the Minister cannot be challenged. The Federal Court has decided that the detention by the Minister was valid (see *Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 MLJ 660; [2009] 2 CLJ 839).

[17] As had been submitted by the plaintiffs' counsel, the defendants failed to see how the plaintiffs could claim damages on the suspension of the detention order coupled with strict severe restrictions for which the defendants are liable on the grounds as stated earlier. In addition, the plaintiffs claimed that all previous proceedings in court vide habeas corpus were on the detention orders of the plaintiffs when the suspension detention order issued by the plaintiffs during those proceedings did not exist then.

[18] The validity of the suspension of the detention orders itself on the plaintiffs is clearly triable and thus testimony of witnesses are requisite. Moreover the premature suspension of the detention order dated 13 December 2007 with the suspension orders on the plaintiffs is also triable.

[19] The plaintiffs went on to submit that the defendants had failed to consider that the plaintiffs were barred under the ISA to challenge the validity of the detention order dated 13 December 2007 on its merits and/or on non-procedural ground. The plaintiffs are now challenging the defendants on non-procedural grounds.

[20] The plaintiffs also claimed that the detention orders on them contravene art 9 of the Federal Constitution. The plaintiffs also dispute the allegation by the respondent that the plaintiffs are a threat to national security in earlier proceedings vide judicial review.

[21] The plaintiffs went on to say that the Prime Minister's act of releasing two of the five Hindraf detainees was an unlawful exercise of power as he was not the Home Minister at the material time. Thus the exercise of that discretionary power is triable and if unlawful, clearly entitles the plaintiffs to damages.

[22] As to the revocation order, the third defendant had issued the said order (*perintah pembatalan*) prematurely, without assigning any grounds and/or reasons whatsoever. The plaintiffs said this is clearly triable.

THE COURT OF APPEAL FINDINGS

[23] After having heard parties we are of the view that this is a plain and obvious case to be struck out pursuant to O 18 r 19. Our reasons are as follows.

[24] One of the plaintiffs' main arguments was that apart from the detention order under s 8(1) of the ISA issued against them, there were other orders issued by the Minister for Home Affairs Malaysia, against the plaintiffs which were not the subject matter of the habeas corpus applications filed by the plaintiffs.

[25] In our view, the above argument is untenable and it is not open for the plaintiffs to now challenge the validity of the said orders. This is because the issues relating to the suspension and revocation orders were events which took place after the disposal of the habeas corpus proceedings. In any case, the plaintiffs did not challenge the validity of the said orders when they were in force.

[26] Moreover the suspension of the detention order under s 10 of the said Act and the revocation of the suspension of detention order under s 8(3) emanated from the original detention order issued pursuant to s 8(1) of the said Act.

[27] We find that there is no issue of res judicata in the present appeal.

However we are mindful of the fact that sub-s (1) of s 8B of the ISA, has completely ousted the jurisdiction of the court in respect of any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of

their discretionary power in accordance with the ISA, except in regard to any question or compliance with any procedural requirement in that Act governing such act or decision.

[28] Thus in view of the above, in the circumstances, this is a plain and obvious case to strike out the plaintiffs' suit.

[29] We therefore dismiss this appeal, but we make no order as to costs.

[30] Deposit to revenue. The order of cost imposed by the court below is hereby set aside.

Appeal dismissed with no order as to costs.

Reported by Kohila Nesan